

Corrected Opinion Filed 04/28/2020 by Clerk of Supreme Court

Filed 2/12/20 by Clerk of Supreme Court

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

2020 ND 39

Kyle S. Ouradnik,

Appellee

v.

Ronald Henke, Director,

Department of Transportation,

Appellant

No. 20190293

Appeal from the District Court of Cass County, East Central Judicial District,
the Honorable Thomas R. Olson, Judge.

REVERSED.

Opinion of the Court by Jensen, Chief Justice.

Mark A. Frieese (argued) and Drew J. Hushka (on brief), Fargo, ND, for
appellee.

Douglas B. Anderson, Bismarck, ND, for appellant.

Ouradnik v. N.D. Dep't of Transp.
No. 20190293

Jensen, Chief Justice.

[¶1] The North Dakota Department of Transportation (NDDOT) appeals from a district court judgment reversing an administrative hearing officer's decision to revoke Ouradnik's driving privileges for a period of 91 days. The NDDOT asserts the district court erred in reversing the administrative decision by ruling on an issue Ouradnik failed to preserve for appeal during his administrative hearing. We reverse the district court and reinstate the administrative hearing officer's decision.

I

[¶2] On April 5, 2019, Ouradnik was arrested for driving under the influence. The arresting officer read an incomplete version of the implied consent warning required by N.D.C.C. § 39-20-01(3)(a) to Ouradnik. After being read the implied consent warning Ouradnik consented to take a breath test.

[¶3] Ouradnik requested an administrative hearing. At the start of the hearing, the hearing officer admitted into evidence, without objection, the following exhibits: a List of Certified Chemical Test Operators, a List of Approved Chemical Test Devices, the Approved Method to Conduct Breath Test with Intoxilyzer 8000, and a Memo Regarding Designees of the State Crime Laboratory Director. At the hearing, the arresting officer testified, without objection, he was certified to administer the breath test completed by Ouradnik, he had ascertained a 20-minute deprivation period prior to administering the test, he administered the test in accordance with the approved method, and he obtained a valid test result.

[¶4] During the hearing, the arresting officer identified a copy of the Report and Notice Form completed in connection with Ouradnik's arrest and stated the document was a true and correct copy of the original. The arresting officer confirmed the form contained his handwriting, his signature, and the signature of Ouradnik.

[¶5] The arresting officer then identified a copy of the Intoxilyzer Test Record and Checklist from the breath test administered to Ouradnik. He testified the document was a true and correct copy of the original, and confirmed the document contained his signature.

[¶6] The Report and Notice Form and the Intoxilyzer Test Record and Checklist were offered as a combined exhibit. Ouradnik objected to the admission of the exhibit into evidence. Ouradnik argued the documents could not be authenticated because the signature used for the certification of the documents belonged to an individual who was on administrative leave at the time the document was certified. The hearing officer took judicial notice that the stamped signature belonged to an individual on administrative leave at the time the exhibit was certified. The exhibit was admitted into evidence.

[¶7] Relying on the Report and Notice Form and the Intoxilyzer Test Record and Checklist, the hearing officer determined Ouradnik had been operating a motor vehicle in violation of N.D.C.C. § 39-08-01. The hearing officer thereafter suspended Ouradnik's driving privileges for a period of 91 days.

[¶8] Ouradnik appealed the hearing officer's decision to the district court. In his specification of errors filed with the court, Ouradnik asserted "the hearing officer erred by admitting evidence and records without foundation, without authentication, and purported certified by a DOT Division Director who was on leave and without authority to certify the records." The specification of errors also included general assertions of error during the administrative hearing.

[¶9] Subsequent to his appeal to the district court, but while the appeal was pending, this Court issued its opinion in *State v. Vigen*, 2019 ND 134, 927 N.W.2d 430. In his brief to the court, citing to our decision in *Vigen*, Ouradnik argued his breath test result was inadmissible because the arresting officer omitted the words "or urine" from the statutory implied consent advisory. Citing to our decision in *Vigen*, the court reversed the hearing officer's decision after determining the result of the breath test was inadmissible because of the omission of the words "or urine" from the statutory implied consent warning.

[¶10] The NDDOT argues the district court erred in reversing the administrative hearing officer's decision based on our decision in *Vigen* because Ouradnik failed to object during the administrative hearing to admission of the breath test result based on the accuracy of the implied consent warning. Ouradnik argues he was not required to make the objection during the administrative hearing because our decision in *Vigen* was not issued until after the administrative hearing officer's decision had been appealed to the court. Alternatively, Ouradnik argues the Report and Notice Form and the Intoxilyzer Test Record and Checklist were not properly authenticated and should not have been admitted as evidence during the administrative hearing.

II

[¶11] The district court reversed the hearing officer's decision based on our decision in *State v. Vigen*, 2019 ND 134, ¶ 17, 927 N.W.2d 430. In *Vigen*, we held exclusion of the test results is the consequence of an officer's failure to read the "or urine" portion of the implied advisory in N.D.C.C. § 39-20-01(3)(a)(2017). *Id.* (N.D.C.C. § 39-20-01(3)(a) was amended effective August 1, 2019, eliminating the reference to "or urine.") The NDDOT argues Ouradnik did not object to the admissibility of test result based on the incomplete implied consent advisory and failed to preserve the issue for review.

[¶12] Rule 103 of the North Dakota Rules of Evidence governs the preservation of issues on appeal from administrative hearings. *May v. Sprynczynatyk*, 2005 ND 76, ¶ 24, 695 N.W.2d 196. To preserve a claim of error under Rule 103, a party must timely object and state the specific ground unless it was apparent from the context. N.D.R.Ev. 103(a)(1). We will reverse the district court's judgment when the basis of the decision was not raised in the administrative hearing. *Jones v. Levi*, 2016 ND 245, ¶ 11, 888 N.W.2d 765.

[¶13] In addition to the lack of objection during the administrative hearing, when a request for judicial review of an administrative decision is made under N.D.C.C. § 39-20-06, the party seeking a review of the decision must comply with the specification-of-error requirement of N.D.C.C. § 28-32-42(4). *Hamre v. N.D. Dep't of Transp.*, 2014 ND 23, ¶ 8, 842 N.W.2d 865. Both N.D.C.C. §§ 39-20-06 and 28-32-42(4) require filing a notice of appeal and specifications of

error in the district court. *Rounkles v. Levi*, 2015 ND 128, ¶ 10, 863 N.W.2d 910. “[T]he specifications of error must ‘identify what matters are truly at issue with sufficient specificity to fairly apprise the agency, other parties, and the court of the particular errors claimed.’” *Id.* (quoting *Hamre*, at ¶ 8). “A party appealing a hearing officer’s decision must file ‘reasonably specific’ specifications of error detailing which matters are at issue, so as to alert the agency, other parties, and the court of the particular errors claimed.” *Midthun v. N.D. Workforce Safety & Ins.*, 2009 ND 22, ¶ 7, 761 N.W.2d 572.

[¶14] This Court has previously recognized the limited authority of courts to review administrative agency decisions:

The right to appeal is governed solely by statute, *Interest of K.J.*, 2010 ND 46, ¶ 14, 779 N.W.2d 635, and an appellant must meet the statutory requirements for perfecting an administrative appeal for a district court to obtain subject matter jurisdiction over the appeal. *Geffre v. North Dakota Dep’t of Health*, 2011 ND 45, ¶ 9, 795 N.W.2d 681. We are mindful that an appeal from an administrative agency to the district court invokes that court’s appellate jurisdiction, *Lewis v. North Dakota Workers Comp. Bureau*, 2000 ND 77, ¶ 8, 609 N.W.2d 445, and that appeals from an administrative agency involve issues of separation of powers of the three branches of government. *See Power Fuels, Inc. v. Elkin*, 283 N.W.2d 214, 220–21 (N.D.1979); N.D. Const. art. XI, § 26. *Meier v. North Dakota Dep’t of Human Servs.*, 2012 ND 134, ¶ 4, 818 N.W.2d 774.

Jones v. Levi, 2016 ND 245, ¶ 5, 888 N.W.2d 765 (quoting *Daniels v. Ziegler*, 2013 ND 157, ¶ 6, 835 N.W.2d 852).

[¶15] At the administrative hearing, Ouradnik objected to the admission of the Report and Notice Form and the Intoxilyzer Test Record and Checklist, asserting a lack of authentication. He argued that certification by an individual who had been placed on administrative leave was insufficient to authenticate the documents. Ouradnik did not object to the officer’s failure to read the “or urine” portion of the implied advisory. By failing to object to the completeness of the implied consent advisory, Ouradnik failed to preserve the issue for review by the district court. Additionally, Ouradnik did not

subsequently identify the incomplete implied consent advisory as an issue in his specification of errors. Because the basis for the court's decision was not raised in the administrative hearing and not included within Ouradnik's specification of errors, we reverse the decision of the court.

III

[¶16] Ouradnik asserts the decision of the administrative hearing officer must still be reversed, and the decision of the district court affirmed, because the test result was admitted without proper authentication. He argues the exhibit containing the test result lacked proper authentication because the authentication was provided by an NDDOT employee who had been placed on administrative leave.

[¶17] The NDDOT argues Ouradnik is required to assert his challenge to the authentication of the exhibit containing the test result through a cross-appeal and his failure to assert the issue through a cross-appeal precludes our review of the issue. "An appellee is entitled on appeal to attempt to save the judgment by urging any ground asserted in the trial court." *Kalvoda v. Bismarck Pub. Sch. Dist. #1*, 2011 ND 32, ¶ 14, 794 N.W.2d 454. "A cross-appeal is necessary only if the appellee seeks a more favorable result on appeal than it received in the district court." *Id.*

[¶18] At the administrative hearing, Ouradnik objected to the admission of the exhibit containing the test result by arguing the exhibit lacked proper authentication. The issue was also included within his specification of errors filed in his appeal to the district court. The court reversed the administrative decision for a different reason, applying our decision in *Vigen*. Ouradnik is not seeking a result more favorable than the result he received in the court, he properly preserved the issue below, and he is permitted argue the issue on this appeal.

IV

[¶19] Ouradnik challenges the admissibility of the exhibit which included copies of the Report and Notice Form and the Intoxilyzer Test Record and

Checklist, asserting the exhibit lacked proper certification by the Director of the NDDOT. “This Court reviews administrative agency decisions to suspend driving privileges under N.D.C.C. ch. 28-32 and accords great deference to the agency’s decision.” *Alvarado v. N.D. Dep’t of Transp.*, 2019 ND 231, ¶ 6, 932 N.W.2d 911. A hearing officer’s decision to admit or exclude evidence will only be reversed on appeal if the hearing officer abused his discretion. *Ell v. Dir., DOT*, 2016 ND 164, ¶ 6, 883 N.W.2d 464. An abuse of discretion occurs if a hearing officer acts in an arbitrary, unreasonable, or capricious manner or if the hearing officer misinterprets or misapplies the law. *Id.* “The admissibility of evidence at an adjudicative hearing before an administrative agency is governed by the North Dakota Rules of Evidence.” *May v. Sprynczynatyk*, 2005 ND 76, ¶ 24, 695 N.W.2d 196.

[¶20] “Before documentary evidence is admissible, it must be authenticated.” *Frost v. N.D. Dep’t of Transp.*, 487 N.W.2d 6, 8 (N.D. 1992). The Century Code provisions governing the administrative hearing in this case provide a statutory method for authentication of certain records of the NDDOT, including the Report and Notice Form and the Intoxilyzer Test Record and Checklist. N.D.C.C. § 39-20-05(4)(a). A director-certified copy of the Report and Notice Form and the Intoxilyzer Test Record and Checklist are admissible as regularly kept records of the director and are self-authenticating under N.D.C.C. § 39-20-05(4)(a). *Rudolph v. N.D. Dep’t of Transp.*, 539 N.W.2d 63, 66 (N.D. 1995); *Maher v. N.D. Dep’t of Transp.*, 539 N.W.2d 300, 303 (N.D. 1995).

[¶21] The parties agree the Report and Notice Form and the Intoxilyzer Test Record and Checklist offered as exhibit one were certified using the signature of an employee of the NDDOT who was on administrative leave at the time of certification. Ouradnik argues an employee who has been placed on administrative leave lacks authority to certify records and, absent proper certification, the records are not admissible. In this case, it is unnecessary to determine whether an employee on administrative leave lacks authority to certify documents of the NDDOT because proper authenticity and foundation for admission of the documents were provided by the arresting officer.

[¶22] When records of the NDDOT are not director-certified, the NDDOT must establish their authenticity with extrinsic evidence under Rule 901, N.D.R.Ev. *Peterson v. N.D. Dep't of Transp.*, 518 N.W.2d 690, 695 (N.D. 1994). Authentication is simply identification and can be accomplished through testimony of a witness with knowledge that an item is what it is claimed to be. N.D.R.Ev. 901(a),(b)(1); *Frost*, 487 N.W.2d 6, 8 (N.D. 1992).

[¶23] Exhibit one included a copy of the Report and Notice Form. The arresting officer identified the copy of the Report and Notice Form as a correct copy of the original form completed in connection with Ouradnik's arrest. The arresting officer confirmed the form contained his handwriting, his signature, and the signature of Ouradnik. Sufficient foundation and authentication were provided to admit the Report and Notice Form into evidence.

[¶24] The combined exhibit also included a copy of the Intoxilyzer Test Record and Checklist which provides the result of the breath test Ouradnik performed subsequent to his arrest. Section 39-20-07, N.D.C.C., addresses the admissibility of Intoxilyzer Test Results in administrative proceedings. The results of the chemical analysis must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered, and if the test is shown to have been performed according to methods and with approved devices and performed by a certified individual. N.D.C.C. § 39-20-07(5); *Ebach v. N.D. Dep't of Transp.*, 2019 ND 80, ¶ 11, 924 N.W.2d 105. The results are admissible without further foundation by the admission of a certified copy of the checklist along with the documents described in N.D.C.C. § 39-20-07(6). *Id.* (citing *Salter v. Hjelle*, 415 N.W.2d 801, 804 (N.D. 1987)).

[¶25] At the start of the hearing, all of the documents described in N.D.C.C. § 39-20-07(6) were admitted into evidence without objection. Subsequent to the admission of the other documents, the arresting officer identified a copy of the Intoxilyzer Test Record and Checklist from the breath test administered to Ouradnik. He testified the document was a true and correct copy of the original, confirmed the document contained his signature, and confirmed the document contained his certification that he had followed the approved method

for conducting the test. The arresting officer's testimony provided sufficient foundation and authentication to admit the Intoxilyzer Test Record and Checklist without the necessity of certification by the NDDOT.

V

[¶26] Ouradnik requests that this Court grant him attorney fees under N.D.C.C. § 28-32-50(1) which generally “requires a court to award reasonable attorney fees and costs to a ‘prevailing’ claimant when an administrative agency has acted without ‘substantial justification.’” *French v. Director*, 2019 ND 172, ¶ 19, 930 N.W.2d 84 (citing *Drayton v. Workforce Safety & Ins.*, 2008 ND 178, ¶ 38, 756 N.W.2d 320). Because we conclude the hearing officer did not abuse its discretion in admitting the Report and Notice Form and the Intoxilyzer Test Record and Checklist, we conclude the NDDOT had substantial justification for purposes of N.D.C.C. § 28-32-50. The request for attorney fees for the appeal to this Court is denied.

VI

[¶27] The district court erred in its reversal of the administrative hearing officer's decision based on our decision in *Vigen* because Ouradnik did not preserve for appeal his challenge to the accuracy of the implied consent warning. The administrative hearing officer properly admitted the Report and Notice Form and the Intoxilyzer Test Record and Checklist after sufficient authenticity and foundation were provided through the arresting officer's testimony. We reverse the court's judgment and reinstate the administrative hearing officer's decision. In light of our decision to reverse the court's judgment and reinstate the administrative hearing officer's decision, we deny Ouradnik's request for attorney fees on appeal.

[¶28] Jon J. Jensen, C.J.
Gerald W. VandeWalle
Daniel J. Crothers
Lisa Fair McEvers
Jerod E. Tufte